STATEMENT OF GERARD T. NOCE, ESQ.

ON BEHALF OF

THE DEFENSE RESEARCH INSTITUTE

AND

THE MISSOURI ORGANIZATION OF DEFENSE LAWYERS

IN RE:

S.837 THE AUTO CHOICE REFORM ACT

Good morning, Mr. Chairman. My name is Gerard Noce. I am an attorney in St. Louis and president of the Missouri Organization Defense Lawyers. I am also Missouri state chair of the Defense Research Institute. Both of those groups are associations of lawyers who represent defendants in civil lawsuits.

There is no question that in many jurisdictions, automobile insurance costs are too high. Defense lawyers agree that states' auto accident reparations systems should be reformed, but strongly believe that the basic principles of the civil justice system are sound. Rather than imposing a federal system of no-fault auto insurance, we urge that each state be permitted to continue to experiment with methods of reducing litigation costs. Meanwhile, we believe that Congress should concentrate on addressing those problems of the civil justice system which have a predominantly interstate character. Your committee is charged with regulating interstate commerce, and, we would submit, there are aspects of the tort system which are a burden on such commerce. Auto accident reparations, however, is not one of them.

FEDERALISM AND TORT REFORM

It seems to us that the Founders had a good idea of how to apportion state and federal responsibility for the legal system. In constructing the union, they recognized that states and state courts would have primary responsibility for administering justice. But they did make some exceptions to the general rule. First, in creating our federal judiciary, they gave federal courts jurisdiction over disputes of citizens from different states. They reasoned that the national government must ensure that state courts would not discriminate against outsiders.

Second, in granting Congress the power to regulate commerce among the states, the Founders sought to ensure that idiosyncratic state laws would not become a burden on interstate trade. The Constitution encourages you to legislate in areas which require national uniformity.

These two principles-- nondiscrimination against out-of-state defendants, and protection against burdensome state laws or practices-- should remain the primary rationales for congressional intervention in the states' justice systems.

Viewed in this light, it is pretty clear that state laws respecting recovery for injuries in automobile accidents are not an appropriate subject for federal preemption. There is simply no national interest in mandating, or even in suggesting, a preferred method of resolving motor vehicle lawsuits. The vast majority of these lawsuits involve individuals who are residents of the same state, who are insured by companies regulated by state officials. Neither state tort laws governing auto accidents nor auto insurance markets

involve interstate distortions or discrimination. In short, there is not the sort of inefficiency or unfairness that only Congress can resolve.

Indeed, I think that imposing national uniformity over such a huge portion of state court litigation would be bad. The states have been called "laboratories of democracy" because they are usually free to experiment with reforms which, once found to be successful, can be copied by other states. Through my participation in DRI, a national association of defense lawyers, I have heard about numerous reforms to the civil justice system that have started in one state and then spread to others. These include discovery reforms, alternative dispute resolution, summary jury trials, and many other ideas. All of these reforms show promise in cutting litigation costs and reducing auto insurance rates. I have summarized a number of these state-level reform concepts in the appendix to my statement.

We have noted that the authors of S. 837 have revised the opt-out provisions from last year's version, giving state legislatures a little more time to decide whether they wish to retain their present systems. But the new provision merely pays lip service to sound principles of federalism. It seems to us that including the opt-out is an admission that there is no real need for national legislation in this area. Also, a one-year deadline would require special sessions to exercise the opt-out in states whose legislatures meet biennially. This comes awfully close to "commandeering" state legislatures and strikes us violating the spirit, if not the letter, of the Tenth Amendment under New York v. United States, 488 U.S. 1041 (1992).

State legislatures are capable of enacting programs like Auto Choice on their own.

Last year, proponents of Auto Choice presented the concept to the annual meeting of the National Conference of State Legislatures. A presentation has also been made to the American Legislative Exchange Council, another group of state lawmakers. There was also an Auto Choice presentation at the 1998 legislative conference of the American Tort Reform Association, attended by state tort reform coalition leaders from across the U.S. Mr. Chairman, state legislators have heard the arguments in favor of this proposal, but have shown no interest in trying it out. It would be wrong for Congress to overrule their choice against Auto Choice.

When *should* Congress get involved in civil justice reform? Congress definitely should legislate in those areas where the availability of fifty different state court systems causes inefficiency or unfairness. There are plenty of examples of this.

Please let me bring to your attention a situation that has developed in my hometown of St. Louis. St. Louis city courts have become a magnet for injury lawsuits involving out-of-state accidents. Most of these lawsuits are filed by railroad workers seeking compensation under the Federal Employers Liability Act. FELA allows railroad workers to recover for on-the-job injuries. But FELA doesn't specify that a lawsuit must be filed in the county or state where the injury took place. This means that plaintiffs' lawyers may file the case in any county where the railroad does business.

Over the years, plaintiffs' lawyers have decided that, given a choice, they'd prefer to file FELA cases in St. Louis. This is because jurors in St. Louis have a reputation for being more "generous" in awarding damages. St. Louis residents are thought more likely to be poor, undereducated, or pro-union, traits that plaintiffs' lawyers seek when picking a

jury.

What is the result of this? The impact on St. Louis is that our residents are called for jury duty more often than residents of any other area in the state, and Missouri taxpayers are paying to process non-Missouri civil cases.

But the wider, national impact is that shippers are paying higher rates to transport their products. That is because, according to a jury verdict expert quoted in the St. Louis Post-Dispatch, [1]damage awards in St. Louis are nine percent higher than the national average, and higher still than awards in some of the rural counties where the railroad accidents take place. Eventually, these higher costs are passed along to consumers. Surely this is a more appropriate matter for the Commerce Committee to be studying than auto insurance.

There are several other interstate tort law issues which also better deserve Congress' attention. One is the issue of multiple punitive damage awards for the same conduct. Punitive damages, unlike compensatory damages, are awarded to punish wrongdoers and deter future misconduct. As you know, these awards can become very large, especially when juries are dealing with out-of-state or foreign corporations for whom they may have no sympathy. Now there is considerable disagreement about whether Congress should cap punitive damages. But our legal tradition disfavors double jeopardy, so there shouldn't be as much disagreement over whether different state courts should be able to pile on multiple punitive awards for a single tortious act. As the federal courts' Working Group on Mass Torts noted, "punitive damages awarded in a small portion of

[1] "Shopping for Justice," St. Louis Post-Dispatch, September 15, 1996.

[mass tort] cases may deplete funds available for compensatory damages for many other victims." [2] This is obviously a problem that *only* Congress can address.

Finally, there is the issue of state courts certifying nationwide class actions. Both the Senate and House Judiciary Committees have held hearings on the problems created by this practice:

- the "drive-through certifications" of classes, in which a judge rubber-stamps approval, giving a plaintiffs' lawyer the leverage to force a settlement of even the most frivolous or *de minimus* claims;
- the use of discount coupon settlements, in which defendants provide virtually worthless coupons to buy their own products, or reversionary settlements, in which defendants retain any money not paid out through the settlement's arduous claim procedure; both of which provide real monetary benefits only to the plaintiffs' attorneys, not to consumers;
- "reverse auction" settlements, by which defendants negotiate with various plaintiffs' attorneys to purchase *res judicata* for the cheapest price.[3]

Only federal legislation can solve these problems. Whenever class actions are filed, as they frequently are, before rural small-town judges who do not have the time or inclination to question class certifications, [4] there is risk that businesses will be blackmailed into settling frivolous claims. And these state court judges, who do not have law clerks or staff attorneys to assist them as federal judges do, also lack the resources to scrutinize settlement agreements, leading to appalling instances of consumers being short-changed.

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[2] Report on Mass Tort Litigation, February 15, 1999

[3] Report of the House Judiciary Committee to accompany H.R. 3789, Class Action Jurisdiction Act of 1998, September 10, 1998. (105-702)

[4] "Justice RFD: Big Suits Land in Rural Courts," Wall Street Journal, October 10, 1996.

But most importantly, the mere fact that class actions involving the same subject matter can filed simultaneously by different lawyers in different state courts inevitably leads to the "reverse auction" process in settling meritorious claims on the cheap. S. 353, a bipartisan bill now pending in the Judiciary Committee, would make a huge step toward ending these abuses by moving multi-state class actions into the federal courts.

CONCLUSION

Over the years, we have seen that it is difficult for even a single liability reform bill to be passed each Congress. We are concerned that, while the sponsors of Auto Choice are well-intentioned, their advocacy of this bill diverts time and attention from other measures, such as class action reform, that deserve a high priority. Moreover, as you have noted, Mr. Chairman, it's much easier for Congress to pass bite-size pieces of incremental reform than it is to pass comprehensive bills such as this one. We urge you to move on to the issues which truly demand federal attention, and leave auto insurance issues to the states.

APPENDIX: STATE LEVEL OPTIONS TO REDUCE AUTO INSURANCE COSTS

Discovery Reform.

A recent study by the Federal Judicial Center found that half of all litigation costs are attributable to discovery, the process of fact-finding in civil lawsuits. [5] The states have taken the lead in trying to reduce these costs. In 1990, the Arizona Supreme Court and the Arizona State Bar created a commission to redraft discovery rules. New rules went into

[5] Federal Judicial Center, "Discovery and Disclosure Practice, Problems, and Proposals for Change," August 22, 1997.

effect in 1992. These rules limit the amount of discovery that attorneys may initiate on their own. They also introduced the concept of "mandatory disclosure," by which parties to a lawsuit are required to disclose certain core information about the case without prompting. Arizona's rules became a model for the federal system-- the federal courts have been experimenting with mandatory disclosure for about five years, and the federal Judicial Conference is currently considering limitations on attorney-initiated discovery. Also, several state court systems have followed Arizona's lead.

Attorneys are divided on whether these sweeping reforms protect their clients' interests. And the empirical studies are not unanimous in concluding that the reforms save a significant amount of money. But Arizona's experience with discovery reform demonstrates that the states' judiciaries and bars are willing to attempt radical changes to reduce the costs of the civil justice system. Moreover, as time goes by, we learn more and more about which methods work. As state experiments continue, bolstered by the knowledge gained by experiments in the federal system under the Civil Justice Reform Act, discovery costs in automobile litigation should drop in every American jurisdiction.

Alternative Dispute Resolution.

In many states, most motor vehicle accident cases are submitted to mandatory court-annexed arbitration. Arbitration hearings are expedited proceedings in which parties present their cases informally, without the need to bring in every witness. Michigan and Arizona have instituted ADR programs with "teeth." If a party rejects an arbitration award and then fails to obtain a more favorable outcome at trial, that party must pay the opponent's attorneys fees and expert witness fees in addition to court costs.

This rule creates an incentive for litigants to accept the arbitration outcome, cutting off the litigation process at an early stage and reducing expenses. Like discovery reform, it also creates a disincentive for plaintiffs to bring non-meritorious lawsuits because the "nuisance value" of the lawsuit is reduced when litigation expense is reduced. A defendant who knows he can head off a frivolous lawsuit at the arbitration hearing need not pay off a plaintiff to get rid of the case at an early stage.

Again, there is a dearth of empirical research into whether attorney fee shifting reduces litigation. Many in the defense bar fear that fee shifting would not be applied even-handedly-- that judges would shrink from enforcing sanctions on individual plaintiffs while enforcing them stringently against wealthy corporations. But as long as states are free to apply these techniques to auto accident litigation, knowledge as to what works will emerge, and other states will then be able to adopt them.

Summary Jury Trials.

Another Arizona innovation is the summary jury trial. The idea of the summary jury trial has been around for some time in the federal court system. It has been used as an ADR method to get a jury's non-binding, advisory verdict to guide the parties to settlement. Arizona's twist on the summary jury trial has been to make it binding. The parties must voluntarily agree to this procedure. Typically, they will also stipulate to the evidence and exhibits to be submitted to the jury, as well as to a "high-low" agreement. The high-low agreement places a ceiling and floor on the amount of the verdict, taking away the risk of either a "runaway" jury or an excessively penurious jury.

A summary jury trial takes no more than one day to hold. The judge conducts an

expedited *voir dire*, the attorneys have time limits on their presentations, and the jurors are given streamlined instructions. As Judge Barry Schneider, civil presiding judge of the Maricopa County Superior Court put it, the parties to a summary jury trial "benefit significantly from having traded away all the tried and true but enormously expensive trappings of the typical jury trial."

The Seat Belt Defense

The "seat belt gag rule" is an exception to the *negligence per se* doctrine which plaintiffs' bar lobbyists have had inserted in many states' mandatory seat belt laws. The common law doctrine of *negligence per se* holds that a jury should consider a party's violation of a statute in determining whether he was negligent. The seat belt gag rule says that a plaintiff's failure to comply with the seat belt law cannot be used against him, even if that non-use increased the damages he suffered. This anomaly rewards the lawbreaker and punishes the consumer. According to a University of Kentucky study, the average cost of treating a motor vehicle accident victim who was not wearing a seat belt is 4.4 times more than the cost of treating seat belt wearers.[6]

We urge that states permit a seat belt defense. While it is expensive for the defense lawyer to bring in expert evidence at trial showing how failure to wear a seat belt added to a plaintiff's damages, the seat belt defense allows us to discount settlement amounts in such cases. That is only fair, since it is wrong for other insurance consumers to pay

[6] Gary Flanagan, "The Seat Belt Defense: Has It Become Unbuckled?" Florida Bar Journal, January 1996.

increased premiums to cover injuries that could have been mitigated if the driver acted responsibly. Note that the Auto Choice plan actually moves away from the principle of personal responsibility-- under Auto Choice, injured drivers would be compensated without regard to whether they caused an accident by their own negligence and without regard to whether they obeyed the seat belt law.

Eliminating the collateral source rule.

This old common law rule prevents jurors from hearing evidence of compensation a plaintiff receives from health insurance, wage continuation programs, or other sources. In most cases, health insurers will file a subrogation lien entitling them to reimbursement for payments from the tortfeasor. But far too frequently, in routine auto cases, health insurers neglect to file their liens. Seldom, if ever, does an employer file a lien for the plaintiff's "sick days." The result is double recoveries for many plaintiffs, and "double taxation" for consumers, who pay higher premiums to fund extra recoveries.

A number of states have abolished or altered the collateral source rule. Because auto accident claims are frequently settled at an amount three times the plaintiff's economic damages, eliminating the rule may reduce payments in individual cases by as much as a third. Moreover, offsetting collateral source payments discourages the filing of some minor claims by making them economically unrewarding for plaintiffs' attorneys.

"No Pay/No Play" for auto accident plaintiffs.

California has disqualified uninsured drivers from collecting non-economic damages. This measure eliminates "free riders" from the tort system-- those who sue to collect damages they incur, but don't take responsibility for paying damages they cause.

According to the Insurance Commissioner in California, this has reduced costs to consumers by one quarter of a billion dollars. [7]

"Medical Injury Profiles".

Some states have experimented with practice guidelines to reduce instances of "defensive medicine:" the ordering by physicians of unneeded tests or procedures solely to avoid medical malpractice suits. These guidelines, formulated with input from medical professionals, can be introduced into evidence by doctors to contest an allegation that a certain medical treatment was necessary. We are proposing that similar guidelines be created for minor injuries from auto accidents. Such guidelines could then be introduced by defense attorneys to contest the reasonableness or necessity of medical treatment claimed by an injured party. [8] This would deter plaintiffs' lawyers from sending clients to "medical bill mills" to ratchet up damage claims.

[7] J.C. Howard, "Calif. Auto Profits in High Gear," National Underwriter, April 20, 1998.
[8] See, e.g., SB 49, California Legislature, Introduced December 20, 1994 (Sen. Lockyer).